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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~1[illegible]~~ 1147

BALDWIN-HALL, INC.,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

GEORGE R. FEARON
Counsel for Petitioner,
306 University Building
Syracuse, New York 13202

COSTELLO, COONEY & FEARON
Of Counsel for Petitioner,
306 University Building
Syracuse, New York 13202

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.

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THE STATE OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above case in the Clerk's Office of the Court of Claims of the State of New York on December 22, 1965.

Opinions Below

There was no opinion by the Court of Claims of the State of New York (R. p. 607). The opinion of the Appellate Division of the Supreme Court of the State of New York (R. pp. 616-617, App. pp. 1a-2a) is reported at 22 A. D. 2d 747, 253 N. Y. S. 2d 651. Two opinions were handed down by the Court of Appeals of the State of New York. A copy of

the first is contained in the Appendix at pp. 2a-4a. The final amended opinion is reported at 16 N. Y. 2d 1005, 265 N. Y. S. 2d 664, 212 N. E. 2d 899 and is printed in the Appendix at pp. 5a-7a.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was made and entered on December 22, 1965 and a copy thereof is printed in the Appendix at pp. 7a-8a. Thereafter a motion for reargument was denied by the Court of Appeals on February 17, 1966 and a copy of the order denying reargument is printed in the Appendix at p. 9a. A copy of an order granting petitioner's motion to amend the remittitur of the Court of Appeals appears in the Appendix at p. 10a and the judgment amending the remittitur appears in the Appendix at pp. 11a-12a.

Questions Presented

In 1957 when the State of New York started reconstructing Oswego Boulevard in the City of Syracuse, petitioner was the owner of a five-story brick building and land which fronted at grade on the boulevard. After the work was completed, the grade of the boulevard had been lowered as much as 8½ feet, the boulevard had been changed into a limited access highway and petitioner no longer had direct access from any street in front of its property.

Petitioner filed a claim with the New York Court of Claims, basing its right of recovery on Section 99 of the Second Class Cities Law which provides that the grade of a street may not be changed except upon payment of damages done (App. p. 13a). The State has assumed the city's liability under Highway Law Section 30 (15) (App. p. 13a). Finding substantial loss to the value of the property caused

solely and directly by the change in grade and permitting no recovery for loss occasioned by the creation of a limited access highway, the Court of Claims allowed compensation in the amount of $57,000.

That judgment was reversed on appeal to the Appellate Division, Fourth Department, which, citing *Selig* v. *State of New York*, 10 N. Y. 2d 34, 217 N. Y. S. 2d 33, 176, N. E. 2d 59, a case decided after petitioner's property had been damaged, held petitioner was entitled to no recovery and all its loss was *damnum absque injuria*.

The New York Court of Appeals, by a 4-3 vote affirmed upon the memorandum of the Appellate Division, with this further comment:

> "The market value of claimant's property was probably diminished after and because of the public improvement which involved a change of grade of Oswego Boulevard on which street claimant's property fronted before any of the changes were made. However, as explained in *Selig* v. *State of New York*, (10 N. Y. 2d 34), such damages although in a sense resulting from a change of grade are not compensable when there has been no taking of any part of the subject property and no direct physical damage thereto from any change of grade of any street. In this instance the street on which the building formerly fronted was moved to a new location some distance away, and depressed, but the building still abutted at one side on another usable street. Such damage as claimant suffered was due to circuity of access and as held in *Selig* there is no provision in law for recovery thereof." (App. p. 5a).

Two dissenting opinions were written which illustrate how grossly erroneous were the analyses of the facts and the principles of law applied. (App. pp. 5a and 6a).

The holding in this case constitutes a repeal by judicial fiat of the change of grade statute and a tacit reversal of the fell established case law in New York which had heretofore permitted recovery under change of grade statutes for

precisely the kind of damages which were claimed by petitioner and allowed by the Court of Claims.

The questions presented here are:

1. Is it a violation of petitioner's right of due process protected by the Fourteenth Amendment to apply retroactively a new or grossly erroneous construction of state statute which overrules previous decisions and deprives petitioner, without compensation, of property rights which had become vested under pre-existing law?

2. Is the state, by refusing to allow compensation for substantial diminution in the value of petitioner's property, compelling it to pay more than its fair share of the cost of the highway improvement and thereby taking its property for a public use without compensation in violation of due process and in deprivation of equal protection of the laws guaranteed by the Fourteenth Amendment?

Constitutional Provisions and Statutes Involved

The pertinent provisions of the change of grade statute, Section 99 of the Second Class Cities Law (Vol. 52, McKinney's Laws of New York, page 6) is set forth in the Appendix at p. 13a. The State's liability for damages recoverable under the change of grade statute is provided by Section 30(15) of the Highway Law (Vol. 24, McKinney's Laws of New York, page 56) is set forth in the Appendix at p. 13a.

The pertinent provisions of the Fifth and Fourteenth Amendments of the United States Constitution are set forth in the Appendix at pp. 13a and 14a, respectively. The relevant portions of Article I, Sections 6 and 7 of the New York Constitution are set forth in the Appendix at p. 14a.

Statement

For the past 39 years, petitioner, a domestic corporation, has been engaged in the business of selling electrical supplies, fixtures and appliances at retail and wholesale in the City of Syracuse, New York, and nearby towns and villages (R. pp. 146, 153; App. pp. 26a and 27a). The property involved is located at Oswego Boulevard and the southwest corner of West Belden Avenue in Syracuse, New York and was owned and occupied by petitioner since 1947.

In 1957 the State of New York commenced construction on a Federal-aid highway project known as Oswego Boulevard-City of Syracuse Arterial. Prior to reconstruction, petitioner's property had a frontage of approximately 103 feet (R. p. 9, App. p. 15a) at grade on Oswego Boulevard (R. p. 10, App. p. 15a). After the work was completed, the grade of the boulevard had been changed and lowered (R. p. 10, App. pp. 15a-16a) from 4 feet at the north end of petitioner's property to 8½ feet at the south end and a retaining wall topped by a metal fence about 4 feet high had been constructed (R. p. 10, App. pp. 15a-16a) separating the front of the premises from the depressed pavement of the former boulevard which had become "Ramp C" (R. p. 10, App. pp. 15a-16a). No service road or any road was left at grade in front of the property (R. p. 23, App. p. 18a). Exhibits 11 and 48 illustrate the substantial change in the highway in relation to petitioner's property.

Exhibit 11.

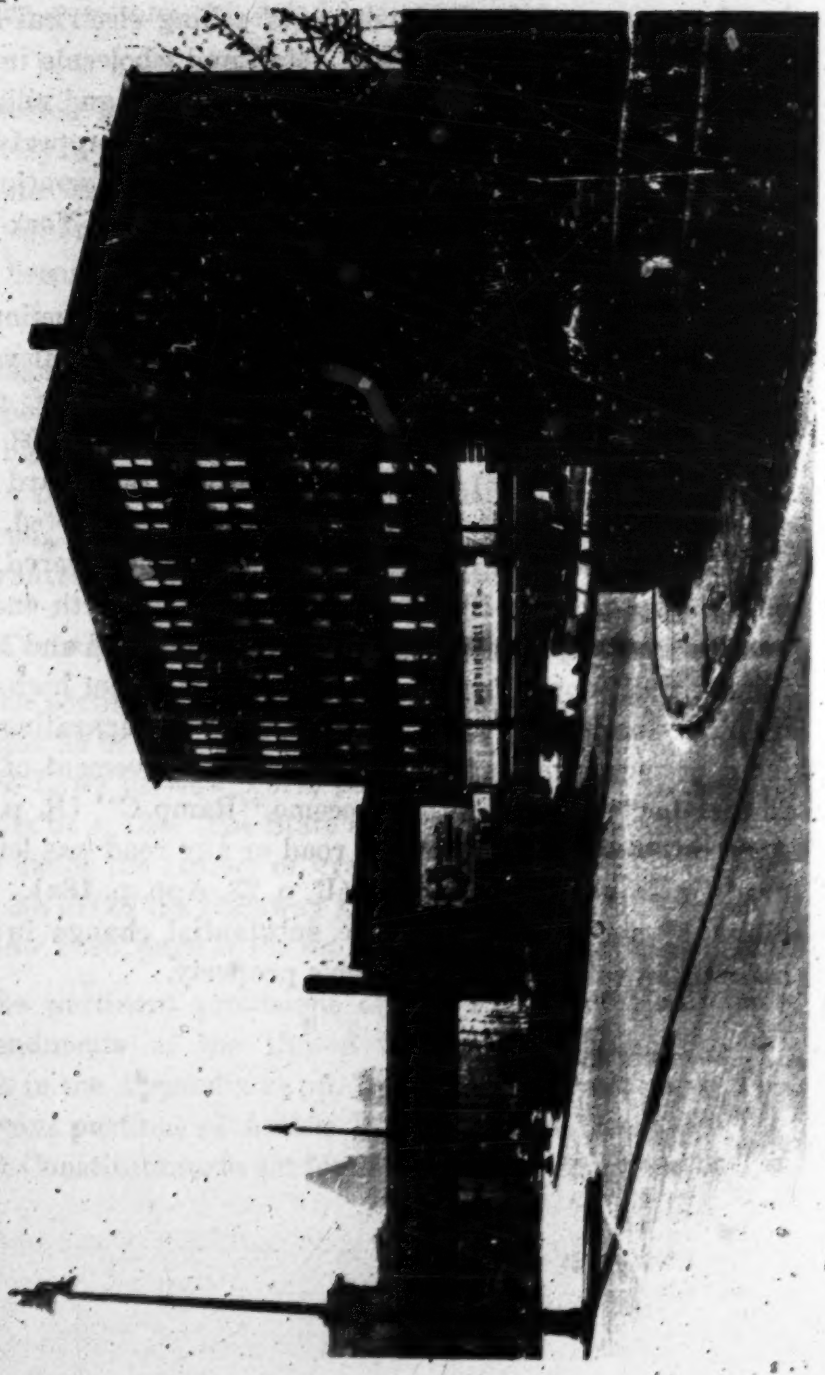
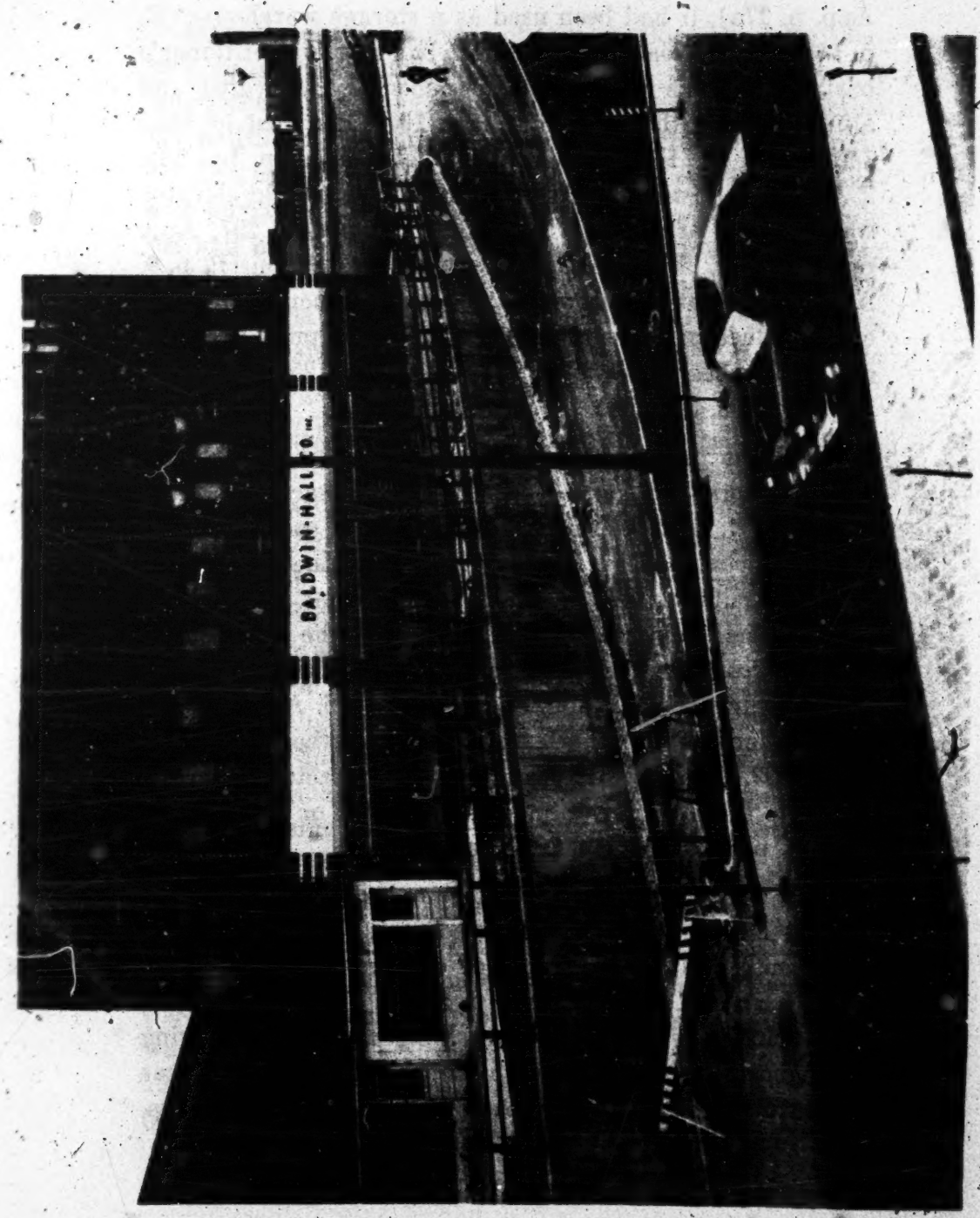


Exhibit 48.



When petitioner purchased the land and five-story brick building on April 30, 1946, for the sum of $45,000 (R. p. 12, App. p. 17a), it had been used as a storage warehouse (R. p. 143, App. p. 26a). To adapt the building for petitioner's business, it was substantially remodeled, renovated and altered during the years 1946 and 1947 at a cost of $44,732.79 (R. pp. 13-15, 142-143, 176-177, 296, App. pp. 18a, 25a-26a, 28a, 29a-30a). A few years later a freight elevator was installed at a cost of $12,059.90 (R. pp. 15, 297, App. pp. 18a, 30a). The building was in good condition (R. p. 9, App. p. 15a) and there was a substantial increase in real estate values in Syracuse between 1946, the purchase date, and 1957, when construction started (R. pp. 25-26, 390-391, App. pp. 19a, 34a-35a).

The front part of the building on the first floor facing Oswego Boulevard had been set up to transact "pick-up" business (R. p. 299, App. p. 31a). Retail customers and electrical contractors, employees of machine shops, job shops, manufacturers and various institutions such as hospitals and schools, were able to approach the front of the building from the grade of Oswego Boulevard and quickly pick up various small appliances (R. p. 146, App. p. 26a), small orders or emergency materials from the countermen (R. p. 299, App. pp. 31a-32a). Small contractors often returned to the store for counter service three or four times a day (R. p. 147, App. pp. 26a-27a).

In the rear part of the first floor, pre-ordered merchandise was assembled, packed and shipped across the loading dock either onto petitioner's trucks or onto vehicles of common carriers (R. pp. 152-153, App. p. 27a). The loading dock, used principally for receiving shipments and delivering merchandise in connection with the wholesale business, was located on the West Belden Avenue side (R. p. 299, App.

pp. 31a-32a) and deliveries were made by petitioner in all directions from its store (R. p. 153, App. p. 27a).

After the change in grade of Oswego Boulevard, petitioner's property became substantially less accessible than it was before (R. p. 24, App. p. 19a) and was no longer suitable for petitioner's business. Before reconstruction, the highest and best use of the property was for retail and wholesale purposes (R. pp. 10, 298, App. pp. 30a-31a). Its highest and best use after reconstruction was for warehousing with very limited retailing on the first floor (R. pp. 10, 413, App. pp. 15a-16a, 36a). Petitioner lost business and customers, causing it to look for another location to operate its business (R. p. 24, App. p. 19a).

On the trial, petitioner's experts placed the fair market value of the property before reconstruction of Oswego Boulevard at $196,050, and after at $48,500, for damages resulting from all factors in the sum of $147,460 (R. pp. 353-355, App. pp. 32a-34a). This testimony was based on what a willing buyer not under compulsion to buy and a willing seller not under compulsion to sell would consider in arriving at a fair value of the property both before and after the change of grade (R. p. 406, App. pp. 35a-36a). The State's own appraiser gave petitioner's structure a depreciated 1957 value of $151,761.60 (R. pp. 467-468, App. pp. 36a-37a), and using the before land value of State's real estate expert amounting to $21,600 (R. p. 520, App. p. 37a), the State's own testimony supports a before value of $173,361.

Yet when petitioner finally made a *bona fide* sale of the property after the reconstruction of Oswego Boulevard, the highest price it could obtain after the building and land was listed with several realtors (R. pp. 24-25, 242, App. pp. 19a, 29a) was $41,000, even though it would cost $195,523.20 at 1957 real estate values to reproduce the building

(R. p. 467, App. p. 36a), which then had a sound value of $151,761.60 (R. pp. 467-468, App. pp. 36a-37a).

Petitioner filed a claim with the New York Court of Claims for damage to the value of its property caused by the change in grade under Section 99 of the Second Class Cities Law which provides that the grade of a street may not be changed except "upon compensation for damages done" (App. p. 13a). It is undisputed that the State has assumed the city's liability under this statute by virtue of the provisions of Section 30(15) of the Highway Law (App. p. 13a).

After the initial proceedings were concluded and the Court of Claims had reserved decision, petitioner's attorneys moved for an order permitting petitioner to introduce additional proof on the question of damages (R. pp. 57, 59-62, App. pp. 21a, 22a-25a). The attorney's affidavit in support of the motion (R. pp. 59-62, App. pp. 22a-25a) shows that the motion was made because the ruling by the Court of Appeals in *Selig* v. *State of New York*, 10 N. Y. 2d 34, 217 N. Y. S. 2d 33 (1961), and the ruling of the Appellate Division in *National Biscuit Co.* v. *State of New York*, 12 A. D. 2d 998, 211 N. Y. S. 2d 435 (4th Dept. 1961), both of which were decided after closing of proof in this case. Both *Selig* and *National Biscuit Company* denied damages to the abutting owner despite change of grade statutes on the ground that there was no change of grade where a portion of the original highway adjacent to the property remained at grade as a service road. While petitioner's case was quite different because no portion of the original highway remained at grade, the Court in the *Selig* case, by way of dictum, had attempted to distinguish between change of grade damages and loss of access damages without defining the difference, thereby causing some confusion with respect to the factors which may be considered in determining the amount of damages recoverable in petitioner's claim.

Therefore, on the rehearing the factors considered in arriving at a damage figure were carefully limited to those directly attributable to the change in grade. The appraiser not only excluded circuity of access and diversion of traffic but loss of view and impairment of light and air as well (R. pp. 561-562, App. pp. 37a-38a). He testified that the before value of the property was the same or $196,050, but the after value, eliminating the factors mentioned, would be $65,000 (R. pp. 561-562, App. pp. 37a-38a).

The Trial Judge viewed the premises (R. p. 11, App. p. 16a). Instead of accepting either the figures of petitioner's or the State's witnesses, he found a before value of $122,000 (R. p. 11, App. p. 16a). However, he did accept the after value of $65,000 (R. p. 11, App. p. 16a) which excludes all non-compensable factors and awarded $57,000 damages directly resulting from the change of grade in front of petitioner's premises (R. p. 11, App. p. 16a).

Petitioner requested and the Court of Claims found, as conclusions of law, that petitioner's property had been taken in such manner as to require the payment of just compensation under the provisions of Sections 6 and 7 of Article I of the Constitution of the State of New York and the Fifth and Fourteenth Amendments of the Constitution of the United States and that a denial of petitioner's claim on the ground that under the authority of the *Selig* case, there was no change of grade would be contrary to law and constitute a violation of petitioner's rights protected by the foregoing constitutional provision (R. p. 33, App. p. 20a).

The State appealed on the single question whether petitioner sustained "any damages legally attributable to a change of grade as it passed in front of its property". The Appellate Division reversed the judgment insofar as it awarded damages (R. p. 615, App. p. 39a), holding on the authority of the *Selig* case that all petitioner's damages

were the result of loss of direct access to the new highway, diversion of traffic making vehicular access to the premises more circuitous from two directions, loss of view and air and that none of those factors gave rise to compensable damages under the change of grade statute. The Court concluded that the diminution in market value of the property is considered *damnum absque injuria* (App. p. 39a).

Petitioner thereupon appealed to the Court of Appeals which affirmed upon the memorandum of the Appellate Division with this further comment as stated in the second, revised opinion:

> "The market value of claimant's property was probably diminished after and because of the public improvement which involved a change of grade of Oswego Boulevard on which street claimant's property fronted before any of the changes were made. However, as explained in *Selig* v. *State of New York,* (10 N. Y. 2d 34), such damages although in a sense resulting from a change of grade are not compensable when there has been no taking of any part of the subjejct property and no direct physical damage thereto from any change of grade of any street. In this instance the street on which the building formerly fronted was moved to a new location some distance away, and depressed, but the building still abutted at one side on another usable street. Such damage as claimant suffered was due to circuity of access and as held in *Selig* there is no provision in law for recovery thereof." (App. p. 5a).

A motion for reargument was made to the Court of Appeals and denied. A motion to amend the remittitur was granted and the Court certified as follows:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the appellant under the Fifth and Fourteenth Amendments were violated. Appellant contends that by changing the grade of the street level abutting its business property the State effected a taking of its property and that the failure to compensate it therefor constituted

a denial of due process under the Fifth and Fourteenth Amendments. The Court of Appeals considered this contention and held that there was no denial of the appellant's constitutional rights." (App. p. 12a).

Reasons for Granting the Writ

It would be difficult to find a case in which there was a more flagrant disregard of federally protected constitutional rights than in this one. Petitioner has been left helpless at the bar of justice in New York, stripped of its property rights by a grossly erroneous and retrospective application of the common law rule of *damnum absque injuria* — a rule characterized by the New York Court of Appeals, *Selig* v. *State of New York,* 10 N. Y. 2d 34, 217 N. Y. S. 2d 33, 176 N. E. 2d 59, as being against natural justice.

Whether the State Court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which petitioner is entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the State Court rests upon a fair or substantial basis. *Demorest* v. *City Bank Co.*, 321 U. S. 36, 42 (1944) as quoted from *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540 (1930).

The taking by a state of property rights for public use without compensation constitutes a deprivation of due process protected by the Fourteenth Amendment. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226 (1896); *Griggs* v. *Allegheny County,* 369 U. S. 84 (1962). The redress afforded petitioner under the change of grade statute is a right to recover damages caused directly by the change in grade and the right to enforce liability for such damages is in every sense a property right which is fixed at the time the property is damaged for a public use and

which cannot be defeated by subsequent legislation., *Ettor* v. *Tacoma*, 228 U. S. 148 (1913). A right settled by judicial construction is as much a part of the statute as the text itself and a change of decision is the same in its effect on vested rights as an amendment of the law by means of a legislative enactment. *Douglass* v. *Pike County*, 101 U. S. 677, 688 (1880). Petitioner's property right was secured to it under the cases which were the law of New York when the right vested and a change of ruling by the Court of Appeals cannot be applied retrospectively. *Muhlher* v. *Harlem R. R. Co.*, 197 U. S. 544 (1905); *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226 (1896).

Until the decision in this case, it was consistently held in New York that an abutting property owner may recover for consequential damages caused by a change in grade where a statute exists permitting such recovery although there was no actual physical taking of any part of the property and no physical damage was done and other access to and from the property remained. The only question was whether the change in grade resulted in a diminution of the value of the property. The following cases will illustrate that fact:

Matter of Grade Crossing Commissioners, 154 N. Y. 550, 49 N. E. 127 (1898). The property was at the intersection of Exchange and Michigan Streets in the City of Buffalo. The grade of Michigan Street was changed but access remained at the same grade via Exchange Street. The award was affirmed.

Solkat Realty Corp. v. *State of New York*, 172 Misc. 981, 16 N. Y. S. 2d 649 (Ct. Claims 1939), aff'd 262 App. Div. 944, 30 N. Y. S. 2d 702 (4th Dep't 1941), aff'd 288 N. Y. 547 (1942). Claimant's property abutted upon South Geddes Street in the City of Syracuse, the elevation of which was lowered by the State to eliminate a grade crossing. The State left claimant with an alternative means of access over West Fayette Street. Nevertheless, recovery was upheld.

Mistretta v. *State of New York*, 201 Misc. 946, 110 N. Y. S. 2d. 527 (Ct. Claims 1952), aff'd 280 App. Div. 960, 117 N. Y. S. 2d 666 (4th Dep't 1952). The property was on the southwest corner of South Work Street and Lester Avenue in the Village of Falconer. The grade of South Work Street was changed but claimant continued to have some access. The award was affirmed.

Cook v. *State of New York*, 176 Misc. 947, 29 N. Y. S. 2d 626 (Ct. Claims 1941), aff'd 267 App. Div. 847, 46 N. Y. S. 2d 15 (3d Dep't 1944). The property was on the southwest corner of Eldredge Street and Prospect Avenue and also abutted on State Street in the City of Binghamton. Street grade changes made claimant's premises less accessible on Prospect Avenue but improved vehicular travel on Eldredge Street. Access to State Street was unaffected. The award for damages resulting from change of grade was sustained.

Knights v. *State of New York*, 161 Misc. 552, 291 N. Y. Supp. 567 (Ct. Claims 1936), aff'd 251 App. Div. 781, 298 N. Y. Supp. 173 (4th Dep't 1937). One of the parcels in question was corner property on Main Street in the Village of Aurora. The grade of Main Street was changed but access to an intersecting street remained. Damages were upheld.

Matter of Mayor, 81 App. Div. 215, 80 N. Y. Supp. 732 (1st Dep't 1903). The property was located on Westchester and Trinity Avenues in New York City. While claimant continued to have the same access from Westchester, damages due to deprivation of the Trinity access because of a change of grade of Trinity Avenue were allowed.

The New York courts neither expressly overruled nor attempted to distinguish the prior cases. They simply ignored them on the authority of *Selig* where there was no change of grade, and, accordingly, there were no damages that were the direct result of a change in grade.

The unreversed finding of the Court of Claims is that there was a change of grade (R. p. 10, App. pp. 15a-16a).

There was not in this case a mere re-routing or diversion of traffic from the highway. The State did not and could not dispute that there was a substantial change in the highway in relation to petitioner's property. It did not even dispute that the value of petitioner's property had been seriously diminished by reason of the highway construction. Indeed, the first opinion of the Court of Appeals states: "The market value of claimant's property was in fact diminished after and because of the public improvement which involved a change of grade of Oswego Boulevard" (App. p. 2a) and the second, revised opinion states the same except there is substituted "probably" for "in fact" App. p. 5a).

The State's argument was that no part of the loss was legally attributable to the change in grade — that it was all caused by the creation of a limited access highway. And the New York appellate courts, in absolute disregard of the facts and the virtually unchallenged expert testimony in the record which excluded to the degree possible all loss of access damages, accepted that argument.

The only conceivable justification for such a holding would be a rule that where it is difficult to separate compensable from noncompensable items of damages, all recovery is precluded. But New York has always followed the rule that where, by the nature of the case, the damages cannot be estimated with certainty, the trier of fact may make the most intelligible and accurate estimate from all the facts and circumstances having any tendency to show damages, or their probably amount. *Drucher* v. *Manhattan Ry. Co.*, 106 N. Y. 157, 163, 12 N. E. 568 (1887); *Duane Jones Co.* v. *Burke*, 306 N. Y. 172, 192, 117 N. E. 2d 237 (1954). Again, the New York courts neither expressly overruled nor attempted to distinguish these cases.

It is clear that the State's errors were gross and obvious, coming close to the boundary of arbitrary action and warranting review by this Court. *Roberts* v. *City of New York*, 295 U. S. 264 (1935). A comparison of the difference between the first opinion of the Court of Appeals and its second one will quickly reveal that the Court had made up its mind that this was a *Selig* case and closed its eyes to the plain facts showing otherwise. The dissenting opinions (App. pp. 5a-7a) further point up petitioner's contention that the State's action is tantamount to a manipulation of State law in evasion of petitioner's federal constitutional rights. See *Demorest* v. *City Bank Co.*, 321, U. S., 36, 49 (1944), dissenting opinion by Mr. Justice Douglas. This Court represents the only remaining hope of correcting the wrong done to petitioner and of preventing future wrong to others who are similarly situated.

In addition to the foregoing, petitioner contends that even if its entire loss should be regarded as having been caused by the creation of a limited access highway, petitioner's property was nevertheless "taken for a public use" without compensation in violation of the due process clause of the Fourteenth Amendment. In *Martin* v. *Creasy*, 360 U. S. 219 (1959) the petitioners were before this Court prematurely for review of the question whether the state could destroy without compensation abutting landowner's right of access to an existing highway by designation of that highway as a limited access highway. The Court stated:

> "If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here." (360 U. S. at 225.)

Moreover, the denial of all compensation violates petitioner's right to equal protection of the laws guaranteed by the Fourteenth Amendment.

It practically goes without saying that providing a system of highways for the benefit of the general public is a proper State function. It follows that the expense of constructing, improving, maintaining and regulating State highways should be borne by the State and paid for from funds received from all the taxpayers of the State through presumtively duly apportioned taxes.

Yet petitioner, a resident taxpayer of New York State, has been compelled to bear, as well as its fair share of taxes, the additional hardship of the loss caused to its property by the State's plan to improve the public highway system.

While there is some justification for the doctrine of *damnum absque injuria* as it developed more than 100 years ago there is no reasonable or equitable basis for its application. In *Radcliff's Executors* v. *Mayor*, 4 N. Y. 195, 53 Am. D. 357 (1850), the Court pointed out at page 207:

> "The damage which they [abutting owners] sometimes sustain, because the level of the street does not correspond with the level of their land is usually more than compensated by the increased value which the property acquires from having a new front on a street. In some instances the land-owner will suffer a heavy loss; * * * but it is *damnum absque injuria*, and the owner must bear it. He often gets the benefit for nothing, when the value of his land is increased by opening or improving a street or highway; and he must bear the burden in the less common case of a depreciation in value in consequence of the work. It may be added, that when men buy and build in cities and villages, they usually take into consideration all those things which are likely to affect the value of their property, and particularly what will probably be done by way of opening and grading streets and avenues."

Thus, 100 years ago, when travel was limited, streets and highways were few and the automobile was unknown, any improvement in a street or highway rendering it safer or more convenient for travel usually resulted in an increase in

the market value of the abutting property, which more than offset any damage due to impairment or loss of access.

But the middle twentieth century brought a revolution wrought by motor vehicle transportation which demanded new and increasingly better highways for the benefit and safety of the general public. Who among today's property owners can foresee where, when and with what consequence he may become caught in the web-like development of the limited access highway?

The reason for the rule has disappeared with changing conditions. State highways benefit all the inhabitants of the State and, as with other public programs, all must bear their fair proportion of the cost. And where an abutting property owner, as a consequence of the improvement, sustains a loss greater than the benefit that accrues to him as a member of the general public, he should be compensated for the difference.

To apply a rule of law which denies any compensation to the abutting owners who have suffered real and substantial loss as a result of the State's highway plan is to select one particular class of persons for *a species of taxation* with no rational basis for such classification. As early as 1898 the United States Supreme Court enunciated the rule that charging a portion of the expense of a street improvement against an abutting owner in excess of any special or peculiar benefits accruing to him results in a taking of property for public use without compensation (*Norwood* v. *Baker*, 172 U. S. 269 [1898]). The Court stated at page 279:

> " * * * [T]he exaction from the owner of private property of the cost of public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation." (Emphasis that of the Court.)

And at page 292:

> "The present case is one of illegal assessment under a *rule or system* which, as we have stated, violated the constitution in that the entire cost of the street improvement was imposed upon the abutting property * * * without any reference to special benefits." (Emphasis that of the Court.)

In *Nashville, Chatanooga & St. Louis Ry.* v. *Walters*, 294 U. S. 405 (1935), it was held unreasonable and arbitrary to burden a railroad with one-half the cost of building an underpass which was part of a Federal-aid highway system when the only contribution by the owners of motor vehicles who would use the highway was in the form of the general taxes paid by them. Justice Brandeis, speaking for the majority, stated at page 429:

> "It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. * * * But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."

The rule was recently reaffirmed in *Atchison, Topeka & Santa Fe Ry. Co.* v. *Public Utilities Commission of California*, 346 U. S. 346 (1953), where the Court stated at page 352:

> "There is the proper limitation that such allocation of costs must be fair and reasonable."

It was shown in this case that the construction involved a Federal-aid highway project (49) benefiting the general public. It cannot be denied that petitioner made its fair contribution in taxes toward the improvement. Nor can it be denied that the State is compelling petitioner, under a rule of law, namely, the doctrine of *damnum absque injuria*, to make an additional, unreasonable and arbitrary contribution of at least $57,000. This amounts to a taking of

private property for public use and constitutes a denial of equal protection of the laws in violation of Article I, Sections 6 and 11 of the New York Constitution and of the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE R. FEARON
Counsel for Petitioner
306 University Building
Syracuse, New York

COSTELLO, COONEY & FEARON
Of Counsel for Petitioner
306 University Building
Syracuse, New York